BRIEF FOR APPELLEES

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 88

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

APPELLANT,

vs.

J. M. LUNA, CHAIRMAN, AND HUGH H. WILLIAMS AND BONIFACIO MONTOYA, MEMBERS, CONSTITUTING THE STATE CORPORATION COMMISSION OF NEW MEXICO, ET AL,

APPELLEES.

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INTRODUCTION

The writer of this brief enters upon his task with considerable diffidence in view of the importance of the question involved and the personal situation of the writer. The writer was Attorney General of New Mexico at the time this case was decided by the United States District Court but his term has since expired and he is now a District Judge of New Mexico. On the perfection of this appeal it develops that the present Attorney General of New Mexico is seriously ill in a distant state and that his assistant, who is a newcomer to the office, knows nothing about the case. Under these circumstances the

writer has consented to prepare this brief during the stress of a busy court term. The writer ventures to hope that perhaps the Attorneys General of some of the other states which have laws similar to the one involved in this appeal will see fit to intervene and give this honorable court the benefit of their views. It is unfortunate that the decision of this momentous question which affects so many states of the Union should rest in part upon the efforts of the writer of this brief.

JURISDICTION.

A considerable portion of appellant's brief is devoted to the question of jurisdiction. The State of New Mexico, from the beginning, questioned the jurisdiction of the Federal Court to entertain complainant's bill on the ground that this is a suit against the State. The State of New Mexico is quite willing to join issue with the appellant upon the merits of the controversy if necessary, but the State is at a loss to understand how the appellant can successfully hurdle the jurisdictional obstruction which the appellant itself has erected. The existence of jurisdiction must be determined by the plain averments of appellant's bill, and the appellees are astonished at the form and allegations of appellant's pleading. Appellant's bill complains of the construction given by certain state officers to certain statutes of the State of New Mexico, but when appellant appears in court it attacks the validity of the statutes themselves. This is a question of pleading and appellees think the appellant should be bound by the plain affirmations of its bill. A painstaking scrutiny of the allegations of the bill discloses that nowhere is a single allegation that the statutes in question are in fact invalid and unconstitutional but, on the contrary, the appellant alleges with what appears to be deliberate intention that the constructions and interpretations given the statutes by the var-

ious state officers are the things which are invalid and of which appellant complains. The first six paragraphs of the bill are devoted to formal allegations concerning the parties, the various statutes involved and the fact that appellant does business in the State of New Mexico. The allegations of matters of which appellant complains begin with the seventh paragraph where it is stated that the Bank Examiner of New Mexico asserts that the statutes of New Mexico "*as so construed by him*" require the suspension of the appellant from the State. The eighth paragraph recites that the appellant company at a hearing before the State Corporation Commission objected to the validity of the statutes "*as so construed and applied*" by the state officers. The ninth paragraph alleges the decision of suspension. The tenth paragraph alleges the threatened suspension of the Company under the statutes "*as so construed and applied by said defendants.*" The eleventh paragraph alleges that the statute of New Mexico "*If construed and applied as the defendants construe and apply it*" will deprive the appellant of due process of law, etc. The twelfth paragraph alleges irreparable loss and damage. Thus, in brief, run the allegations of appellant's bill which it brings before this court. The bill indicates on its face not a mere careless failure to allege the invalidity of the statute of New Mexico but discloses an apparently purposeful avoidance of any such direct allegation, and the entire complaint of the appellant is directed to the acts of the various state officers and to their constructions and applications of the State statutes. The appellant has created this situation itself. It elected to file a bill which questions merely the administrative and executive acts of certain officers, their methods of proceeding and their constructions and interpretations of state statutes, instead of questioning the validity of the statutes themselves.

It is an axiomatic proposition that such an attempted

action is abortive and is in fact an attempted action against the State. This proposition requires no citation of authority.

> "No case can be found where an injunction against a state officer has been upheld where it was a conceded that said officer was proceeding under a valid state statute." (*Harkrader v. Wadley*, 172 U. S. 148).

In the instant case while there is in the Bill no direct concession that the statute itself is valid, yet the failure to allege its invalidity and the fact that appellant bases its complaint solely and exclusively upon the construction given the statute by the various state officers is, of course, tantamount to a concession of the validity of the statutes themselves. It is too clear for argument that a suit against an officer of the state to enjoin him from instituting prosecutions under a state statute on the ground that he is proceeding under an erroneous construction of the law which would render it invalid and in violation of the Constitution of the United States, is one, in effect, against the State of which a Federal Court is denied jurisdiction by the Eleventh Constitutional Amendment. Such is the decision in *Arbuckle v. Blackburn*, 113 Fed. 616. In the case just cited the Court said:

> "It is urged that this statute 'construed as respondent claims it should be' is in conflict with the Fourteenth Amendment to the Constitution. * * * The argument is that conceding for this purpose that the statute is constitutional when properly construed and enforced, the respondent's wrongful construction thereof results in an infraction of the constitutional rights of the complainants. * * * The jurisdiction of courts of equity has never been carried to this extent in authoritative decisions. On the contrary, the Supreme Court in more than one instance has denied such jurisdiction to a court of equity."

It is difficult to understand why appellant has placed

itself by its own complaint within the fundamental rule above quoted. As has been stated heretofore in this brief, it is a matter of some astonishment that appellant should deliberately and positively frame its Bill of Complaint so as to indicate to the court to which it applied that the court could not possibly have jurisdiction in the cause. As we read the brief of appellant, it seeks to derive some comfort on the jurisdictional difficulty from certain language in the answer of the appellee, but certainly no jurisdiction could be conferred upon the court by any answer of appellees' where the bill of complaint shows affirmatively that the court has no jurisdiction, and in any event there is no language in appellee's answer which supplies any deficiency in appellant's complaint. The objection to the jurisdiction of the court was not only particularly and sufficiently raised by the apellee's answer, but is still raised here.

While appellees do not conceive that this honorable court will entertain this cause, yet precaution dictates that we should proceed to a discussion of the merits.

THE STATE HAS THE RIGHT TO REGULATE FOREIGN INSURANCE COMPANIES

The first division of appellant's brief on the merits is devoted to an elaborate review of the decisions of this Court touching the powers of the states to regulate foreign corporations and impose conditions on their entrance into the state. Beginning with the earlier cases the brief presents the case of *Allgeyer v. Louisiana*, and then dwells upon the overruling of *Security Mutual Ins. v. Prewitt* by the recent case of *Terral v. Burke Contr. Co.* 257 U. S. 529, which will be hereafter referred to as "the *Terral* case."

Appellant states that if in the opinion in the *Terral* case there be substituted for the words "resorts to the

federal" a more general expression, *e.g.* "exercises a federal constitutional right," then the opinion would be applicable to the instant case. From this voluminous discussion appellant makes the conclusion that a state may not impose upon a foreign corporation terms which involve the surrender of a constitutional right. And this conclusion, it is claimed by appellant, is cinched by the *Terral* case.

We shall not enter into a clamorous argument with appellant over what this Court meant to decide in the *Terral* case. We doubt whether the appellant can tell this Court the scope or proper interpretation of its opinion and we know that we can not. The *Terral* case was concerned with the question of the prohibition by the state of a foreign corporation's right of removal to the federal courts and whether this Court intended by its decision to cover all constitutional rights we do not know. Several alternatives may be suggested. It may be that the *Terral* case decided that considerations of public policy forbid the denial of entrance of litigants into any proper court. It may be that the decision was founded on the broad political principle that a state can not obstruct the functions of the federal government or its agencies. It may be that the case intended to decide just what appellant claims. It may be proper to suggest that the courts which have occasion to apply the *Terral* case have almost all confined its application to the proposition that a state can not interfere with the jurisdiction of a federal court. *Central Union Fire Ins. Co. v. Kelly* 282 Fed. 772; *Chicago M. & St. Paul Ry. v. Schendel* 292 Fed. 326; *Maxwell v. Hicks* 294 Fed. 254; *Twohy Brothers Co. v. Kennedy,* 295 Fed. 462 (Dissenting opinion); *Foy & Shemwell v. Georgia-Alabama Power Co.* 298 Fed. 643. It should also be stated however that several cases are to be found where it is baldly stated that no state can deprive a foreign corporation of a constitutional right as a condition precedent to

doing business within the state. It may further be suggested that perhaps the Chief Justice intended a limited application of the rule stated in the *Terral* case because of his citation of the cases of *Paul v. Virginia* 8 Wallace 168 and *Hooper v. California* 155 U. S. 648 with approval in his latest opinion in the case of *National Union Fire Ins. Co. v. Wanberg,* 260 U. S. 71.

In the case of *Paul vs. Virginia,* it will be recalled that Mr. Justice Field said:

> "Now, a grant of corporate exsitence is a grant of special privileges to the corporators, enabling them to act for certain designated purposes as a single individual, and exempting them (unless otherwise specially provided) from individual liability. The corporation being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. As said by this court in *Bank of Augusta v. Earle,* 'It must dwell in the place of its creation, and cannot migrate to another sovereignty.' The recognition of its existence even by other States, and the enforcement of its contracts made therein, depend purely upon the comity of those States—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion."

And in the *Hooper* case, Mr. Justice White said:

> "Whilst there are exceptions to this rule, they embrace only cases where a corporation created by one state rests its right to enter another and to engage in

> business therein upon the Federal nature of its business. As, for instance, where it has derived its being from an Act of Congress, and has become a lawful agency for the performance of governmental or quasi governmental functions, or where it is necessarily an instrumentality of interstate commerce, or its business constitutes such commerce, and is, therefore, solely within the paramount authority of Congress. In these cases, the exceptional business is protected against interference by state authority. The reasons upon which the exceptions to the general rule are based have been often explained."

In the recent *Wanberg* case by the Chief Justice, however, it was held that the condition imposed upon the foreign corporation was not in fact a deprivation of a constitutional right. At any rate the appellees do not intend to assault this court with any blatant claim that the *Terral* does not mean what appellant urges. We take it that this Court will say whether it intended a limited or a broad application of the rule laid down without assistance from the appellees or the appellant. It is important that the position of this Court be clarified and the states informed of the extent of their right to deal with foreign corporations. The states are entitled to know whether the long asserted power of absolute regulation and imposition of such conditions as they please to demand is at an end. The states are entitled to know whether this long asserted power has been reduced to the single power of exclusion in the first instance or whether that too has been taken away. If the rule of the *Terral* case is to be extended to include every constitutional right as appellant contends then it seems likely that the application of the "equal protection of the laws" clause of the constitution will create a perfect parity between foreign and domestic corporations resulting in the complete abrogation of the power of the states to regulate foreign corporations as such. We hope this Court does not intend to wipe out the powers of the states in this regard. Con-

fronted with the *Terral* case we can only borrow the words of Mr. Chief Justice Holmes in *Commonwealth v. Nutting* 175 Mass. 154 shortly after the decision by this Court of *Allgeyer v. Louisiana:*

> "We bow to the decision and even to the intimations of the case cited, without criticism. But that case expressly leaves intact the settled power of the state to impose such conditions as it pleases upon the doing of any business by foreign insurance companies within its borders."

THE NEW MEXICO STATUTES INVOLVED IN THIS APPEAL DO NOT IN FACT REQUIRE THE SURRENDER OF ANY CONSTITUTIONAL RIGHT

The New Mexico statutes involved in this appeal and fully cited in the record and appellant's brief constitute a familiar type of "Resident Agent Laws" enacted by many of the states. At least twenty-seven states have resident agent laws containing compensation features similar to the New Mexico provision. The appellant minimizes this circumstance by declaring in effect that the states have failed to pay due heed to the decisions of this court and that the desirability of legislation bears no relation to its constitutionality. It seems improbable that so many states would have enacted resident agent laws with intentional insolent disregard of this Court or in complete ignorance of the law of the land.

It has long since been settled, and is conceded by appellant, that a state acting under its power to regulate the insurance business may require a foreign insurance company doing business in the state to maintain a resident agent within its borders. The reason for such a requirement is not hard to discover. A responsible authorized local person must represent the company and execute its policies as a protection against fraudulent and worthless contracts. Moreover in case of loss, change in rate of

premium, mistake in the policy or bond, transfer of policy, change in risk and the like it is imperative that the citizen have access to some bona fide representative of the company with power to act, and bind his principal.

If the state possesses the power to insist upon a resident agent it likewise possesses the power to make sure that he be a bona fide agent and not a mere dummy or pretended agent. Probably the statutes in question do nothing more than define a bona fide resident agent, *i.e.* —one who receives the commissions on business placed in the state. This requirement is not for the economic advantage of the agent but for the benefit of the public.

Other states impose the requirement in their resident agent laws that the agent shall maintain his principal office within the state. New Jersey has such a requirement and consequently a citizen of New Jersey maintaining an office in New York City to which he commutes daily would not be a qualified agent within the meaning of the New Jersey statute. In other words, the state of New Jersey has the right to insist that the agent maintain his chief office within its borders. This provision of the New Jersey law was doubtless included by way of enforcing the main provisions of the law. It is a provision in aid of the law for the purpose of making sure the agent shall be a bona fide one. The New Jersey law, like the New Mexico law, in a measure defines what a resident agent must be,—in New Jersey he must be a man who actually has his principal office within the state, while in New Mexico he must be a man who collects the commission on the premium. Without these two salutary provisions in the laws of New Jersey and New Mexico it would doubtless turn out that the so-called resident agents of New Jersey would be New Yorkers and the so-called resident agents of New Mexico mere figure heads who would countersign insurance policies and bonds at so much a signature. The issue then as appellees view it

resolves itself into this query: Granting that the State has a right to insist upon a resident insurance agent, can the state make such other reasonable requirements to insure that such resident agent shall be a bona fide one?

In connection with these observations on the necessity of safeguarding the primary objects of the law we think it appropriate to quote additional language of Mr. Justice Holmes bearing on our contention that the compensation requirement of the New Mexico statute is a fair means of insuring a bona fide resident agent and enforcing the law as a whole by rendering it impossible for the insurance company to circumvent the requirement by means of a mere dummy agent.

> "One main object in imposing such conditions in the Commonwealth is to secure people against fraudulent or worthless contracts, and, in case of litigation, to save them from having to go abroad. We assume, until it is decided otherwise, that the power to enforce these objects will be regarded as too important and substantial to be defeated by a device, even tho the device apart from its purpose would only embody common law right." (*Commonwealth v. Nutting* 175 Mass. 154.)

The Supreme Court of New Jersey in the case of *Ferguson v. Tuttle* 112 Atlantic 596 decided in 1921, after noting the decisions of this Court, held the New Jersey statute which prescribes that no insurance company may transact business in the state except thru agents "whose principal place of business is located in this state" is valid legislation which does not abridge any right guaranteed by the state or federal constitutions. Little difference in principle can be discerned between the New Jersey statute and the New Mexico statute for both are designed to insure the presence of a bona fide agent within the state. New Jersey does it by making the agent maintain his *principal* office within the state, while New Mexico does it by insisting that the agent be a person who collects the commissions.

Appellant professes to see in the New Mexico statute some curtailment of the right of contract and some attempted denial of the right of appellant to pay wages to its employees beyond the boundaries of New Mexico. Pages of frenzied argument to this effect culminate in a climax where it is declared that the New Mexico statute is a hundred per cent minimum wage law and also a zero maximum wage law. And with consistent appropriateness appellant cites the *Kansas Industrial Court* and allied cases. We decline to be drawn into the maze.

Appellant seeks to divide the act of placing a bond or policy into *solicitation* and *execution*, and argues that the solicitation if done outside of the state must be paid out of the usual commission. The state recognizes no such segregation and is concerned only with the placing of the policy no matter what separate services or acts preceed it. Any employee "soliciting" New Mexico business outside the state doubtless performs valuable services for the company which the State of New Mexico has no objection to the company compensating. The entire overhead of the company including the services of the president and the efforts of the janitor of the home office likewise contribute in some measure to the placing of the policy in New Mexico. But neither the solicitor nor the president nor the janitor can claim any vested right to participate in the commission which New Mexico insists must go to the resident agent. And whenever services are performed by any outsider they are performed with notice that the resident agent who executes the policy must receive the commission and that the outsider must look to the remainder of the premium for his compensation. The State of New Mexico must insist upon a real resident agent,—a solicitor in Colorado will not do.

Respectfully submitted,

MILTON J. HELMICK,
Counsel for Appellees.

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